



Office of the General Counsel

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Submitted via Email: ICE.Regulations@ice.dhs.gov

Ms. Debbie Seguin
Assistant Director, Office of Policy
U.S. Immigration and Customs Enforcement
Department of Homeland Security
500 12th Street, SW
Washington, DC 20536

Re: DHS Docket No. ICEB-2018-0002, Comments in Response to Proposed Rulemaking on “Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children”

Dear Ms. Seguin,

The United States Conference of Catholic Bishops (“USCCB”), the public policy agency of the Catholic Bishops in the United States, offers the following comments to the Department of Homeland Security (“DHS”) and the Department of Health and Human Services (“HHS”) regarding the Notice of Proposed Rulemaking (“NPRM” or “proposed rule”) to implement and amend regulations relating to the apprehension, processing, care, and custody of immigrant children under the *Flores* Settlement Agreement (“FSA”),¹ published in the Federal Register on September 7, 2018 (83 Fed. Reg. 45,486).²

USCCB’s Department of Migration and Refugee Services (“USCCB/MRS”) has operated programs, working in collaboration with the U.S. government, to help protect unaccompanied children from all over the world for nearly 40 years. Since 1994, USCCB/MRS has operated the “Safe Passages” program. This program serves undocumented immigrant children apprehended by DHS and placed in the custody and care of HHS’s Office of Refugee Resettlement (“ORR”). Through cooperative agreements with ORR, and in collaboration with community-based social service agencies, the Safe Passages program provides residential care (i.e., foster care and small-scale shelter placements) to unaccompanied children in ORR custody, as well as family reunification services (i.e., pre-release placement screening (“home studies”) and post-release

¹ Settlement Agreement, *Flores, et al. v. Reno, et al.*, Case No. CV 85-4544 (C.D. Cal., Jan. 1, 1997), available at https://cliniclegal.org/sites/default/files/attachments/flores_v._reno_settlement_agreement_1.pdf.

² Apprehension, Processing, Care, and Custody of Alien Minors and Unaccompanied Alien Children, 83 Fed. Reg. 45,468 (Sept. 7, 2018).

social services for families (“post-release services” or “PRS”). In fiscal year 2017, the USCCB/MRS Safe Passages program served 1,294 youth who arrived as unaccompanied children—1,042 through the family reunification program and 252 through residential care programs.

Additionally, the Catholic Church in the United States has long worked to support immigrant families who have experienced immigrant detention, through the provision of legal assistance, visitation, and pastoral accompaniment to those in immigrant detention facilities, as well as social services assistance to those released. USCCB/MRS has also operated several alternatives to detention programs to assist immigrant families and other vulnerable populations.³ Through all of this work, we have seen first-hand the importance of the protections set forth in the FSA, and we have worked to help implement and ensure government compliance with these requirements.

We understand that parties to the FSA contemplated, in the 2001 stipulation, the publication of regulations implementing the agreement’s terms.⁴ The stipulation modified the provision providing for termination of the agreement, noting that the FSA would terminate “45 days following defendants’ publication of final regulations implementing this Agreement.”⁵ This language, however, also makes clear that the parties and the court envisioned such regulations as reflecting or “implementing” the terms of the agreement, *not* seeking to expand or change them. Nevertheless, the NPRM published by DHS and HHS proposes substantial changes to the terms of the FSA. This proposal is, unfortunately, an attempt to amend unilaterally the conditions to which the government previously agreed and which were entered by the *Flores* court, and, if implemented would drastically undermine protections for children.

While the proposed rule would make myriad changes to the FSA, USCCB is particularly concerned with:

1. DHS’s proposal to revise the definition of “licensed facility” in a manner that is contrary to the plain terms of, and child welfare principles embodied in, the FSA, as well as numerous judicial orders, and which present grave public policy concerns;
2. DHS’s proposal to create an alternative federal licensing scheme for family residential centers (“FRCs”), which would fail to provide substantially similar protections for children as compared to the current state licensing standards required by the FSA;

³ See, e.g., U.S. Conference of Catholic Bishops/Migration and Refugee Serv., *et al.*, *The Real Alternatives to Detention*, JUSTICE FOR IMMIGRANTS, available at <https://justiceforimmigrants.org/2016site/wp-content/uploads/2017/07/The-Real-Alternatives-to-Detention-FINAL-06.27.17.pdf> (last visited on Sep. 25, 2018).

⁴ Stipulation Extending Settlement Agreement, *Flores v. Reno*, Case No. CV 85-4544 (C.D. Cal., Dec. 7, 2001).

⁵ *Id.*

3. DHS's suggested definition of "non-secure facility," given how the proposed definition seemingly conflicts with existing state definitions and judicial determinations; and
4. DHS's and HHS's efforts to revise the definition of "emergency" and the corresponding emergency exceptions to the FSA requirements, as it would provide the government with more leeway to breach the agreement's terms.

Additionally, in a fifth subsection, USCCB/MRS offers its concerns and suggestions in response to HHS's specific request for comments on the possibility of adding regulations regarding the standards for home studies and post-release services.

USCCB/MRS recognizes that both DHS and HHS will have corresponding responsibilities under the proposed rule and that a separate set of rules would apply accordingly. DHS will revise 8 CFR § 236.3 while HHS will create a new 45 CFR Part 410. USCCB's comments are related to both proposed sections. These comments turn first to the DHS sections and then to the HHS sections.

1. 8 CFR § 236.3(b)(9) – DHS's Revised Definition of "Licensed Facility" Seeks to Circumvent Court Decisions and Expand an Inhumane and Costly Practice.

The FSA requires that children be placed in facilities that are non-secure and "licensed by an appropriate State agency," unless placement in a secure facility is otherwise required.⁶ The three FRCs - Karnes County Residential Center, Berks Family Residential Center, and South Texas Family Residential Center - currently operate a combined 3,326 beds.⁷ These facilities, however, are not licensed for childcare in their respective states and, as such, fail to meet basic child welfare requirements currently set forth in the FSA.

The proposed rule seeks to create an alternative federal licensing scheme for such facilities when state licensing schemes for detention of accompanied children are "not available."⁸ This revision would allow for FRCs that cannot be licensed in the state in which they operate to detain accompanied children if they meet the standards set forth in 8 CFR § 236.3(i)(4). DHS proposes to employ an independent entity to monitor compliance with these standards. As detailed below, we object to this proposal because it contravenes the FSA on its face, seeks to circumvent numerous decisions by the U.S. District Court for the Central District of California, and raises serious public policy concerns.

As an initial matter, the plain language of the FSA requires that facilities holding immigrant children be licensed by the state.⁹ This language leaves no room for ambiguity or alternative interpretation, and DHS cannot post-hoc supply an alternative licensing definition simply because

⁶ Settlement Agreement, *Flores*, *supra* note 1, ¶¶ 6, 19, 23.

⁷ 83 Fed. Reg. at 45,512.

⁸ *Id.* at 45,525.

⁹ Settlement Agreement, *Flores*, *supra* note 1, ¶ 6.

the state schemes do not currently allow for licensing of its FRCs. In fact, Judge Gee, for the U.S. District Court for the Central District of California, has repeatedly found during recent litigation regarding the FSA that “[t]he fact that the family residential centers cannot be licensed by an appropriate state agency simply means that, under the Agreement, class members cannot be housed in these facilities except as permitted by the Agreement.”¹⁰ Further, when the government specifically requested an exemption to the temporal limitations placed on detention of children in unlicensed facilities earlier this year, the court denied the request.¹¹ In its justification for the NPRM, DHS makes the same arguments that failed before that court. Its proposed rule is consequently no more than an improper effort to find an end-run around the existing limitations and judicial decisions, via rulemaking.

In addition, DHS’s suggested definition would allow for vastly expanded use of family detention. The proposal would permit DHS to detain many of the accompanied children entering the country with their parents in the existing FRCs through the duration of their immigration proceedings. As discussed below, such a proposal presents significant public policy concerns given the negative impact it would have on accompanied children, their families, and the U.S. taxpayer.

The severe health and safety consequences of detaining children in DHS custody is well documented.¹² Unfortunately, the negative consequences of family detention are neither minor nor short-term. The American Academy of Pediatrics (“AAP”) has reported that detained children experience developmental delay, poor psychological adjustment, post-traumatic stress disorder, anxiety, depression, suicidal ideation, and other behavioral problems.¹³ The AAP has further found that detention, even for brief periods, negatively effects not only the child, but also the adult and family structure.¹⁴ For example, it has noted that “[d]etention itself undermines parental authority and [parents’] capacity to respond to their children’s needs.”¹⁵

Furthermore, two medical and psychiatric experts hired by DHS itself recently expressed their concerns with the practice of family detention in a letter to the Senate Whistleblowing Caucus.¹⁶ After repeated investigations, the experts explained that: “The fundamental flaw of family detention is not just the risk posed by the conditions of confinement – it’s the incarceration of children itself.”¹⁷ The experts further noted that “[i]ndefinite detention, even for short periods, exacerbates the stress associated with detention and therefore increases the risk of harm.”¹⁸ They

¹⁰ Order on Motion to Enforce at 12-13, *Flores, et al. v. Johnson, et al.*, cv-85-4544 (C.D. Cal. July 24, 2015); Order on Motion to Enforce at 29, *Flores, et al. v. Sessions, et al.*, cv 85-4544 (C.D. Cal. June 27, 2017) (quoting the July 24, 2015 order).

¹¹ Order Denying Application for Limited Relief, *Flores, et al. v. Sessions, et al.*, cv 85-4544 (C.D. Cal. July 9, 2018).

¹² J. M. Linton, *et al.*, *Detention of Immigrant Children*, 139 PEDIATRICS 1-13 (2017).

¹³ *Id.* at 6.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Scott Allen, MD & Pamela McPherson, MD, *Letter to Senate Whistleblowing Caucus* (July 17, 2018), available at <https://www.whistleblower.org/sites/default/files/Original%20Docs%20Letter.pdf>.

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 4.

therefore recommended that DHS halt family detention except in very limited circumstances.¹⁹ A similar recommendation has also been made by DHS's Advisory Committee on Residential Centers.²⁰

DHS's justification for proposing to alter the FSA's licensing requirements not only fails to address these concerns, but it also consistently dismisses the fact that it has a spectrum of humane, proven, and cost-effective alternatives to detention (ATDs) that it can utilize - and is utilizing in some cases - to monitor families released from custody. Such alternatives are typically preferable, as they avoid inflicting unnecessary and long-lasting trauma on children and families. Additionally, detaining families that do not present a flight or safety risk is an unnecessary use of limited DHS resources. DHS has projected that in Fiscal Year ("FY") 2019 family detention will cost approximately \$319 per individual/per day.²¹ This compares to just over \$4 per individual/per day for those enrolled in the Intensive Supervision Appearance Program ("ISAP") III²² ATD program or \$36 per family/per day for those in ICE's former Family Case Management Program.²³ Consequently, even though it takes longer to process individuals' immigration cases when they are not detained,²⁴ the government - and by extension the U.S. taxpayer - would save, on average, an estimated \$22,512 per family (one parent, one child) if DHS released the family and placed the parent on ISAP III, rather than detaining them in an FRC.²⁵ For these reasons, we urge DHS to minimize the use of family detention. DHS should revisit existing policy and program options currently available to it, such as ATD programs and family case management rather than seeking to unilaterally amend the FSA.

Additionally, even assuming that DHS's federal licensing scheme is theoretically permissible and otherwise meets the FSA requirements - and, as discussed below, it does not - the proposed definition essentially allows DHS to self-certify its facilities for compliance with the licensing requirements. While the proposal contemplates hiring an outside entity, this entity would

¹⁹ *Id.* at 3.

²⁰ ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS, REPORT OF THE ICE ADVISORY COMMITTEE ON FAMILY RESIDENTIAL CENTERS 2 (OCT. 2016), *available at* <https://www.ice.gov/sites/default/files/documents/Report/2016/acfrc-report-final-102016.pdf>.

²¹ DEP'T OF HOMELAND SECURITY, U.S. IMMIGRATIONS AND CUSTOMS ENFORCEMENT BUDGET OVERVIEW CONGRESSIONAL JUSTIFICATION, FISCAL YEAR 2010, 111 (2018), *available at* <https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf>
²² *Id.* at 147.

²³ Aria Bendix, *ICE Shuts Down Program for Asylum-Seekers*, THE ATLANTIC (June 9, 2017), <https://www.theatlantic.com/news/archive/2017/06/ice-shuts-down-program-for-asylum-seekers/529887/>.

²⁴ This also is assuming that the government could detain a family through the completion of their immigration proceedings.

²⁵ Calculated as \$638 per day for a family of two in an FRC ($\$319 \times 2 = \638) and multiplied by the average time to process an individual on the detained docket, 40 days ($\$638 \times 40 = \$25,520$). For ISAP, calculated as the daily rate for the head of household to be enrolled and multiplied by the average time to process an individual on the non-detained docket, 752 days ($\$4 \times 752 = \$3,008$). Thus, on average, a savings of \$22,512 can be estimated if the family is kept on ISAP III as opposed to detaining the parent and child in an FRC. Please note that docket length averages utilized were those supplied by DOJ to the Senate. See Joseph Edlow, *Senate Homeland Security and Government Affairs Committee Hearing on "The Implications of the Reinterpretation of the Flores Settlement Agreement for Border Security and Illegal Immigration Incentives"* (Sept. 18, 2018), *available at* <https://www.hsgac.senate.gov/hearings/the-implications-of-the-reinterpretation-of-the-flores-settlement-agreement-for-border-security-and-illegal-immigration-incentives> (during questioning by Sen. Johnson).

be employed by ICE, which calls into question such an entity’s ability to truly be independent and ensure compliance. In contrast, the FSA requires certification by an outside and fully independent entity with expertise in child safety – the state’s child welfare agency.²⁶ Furthermore, DHS already contracts with Nakamoto Group, Inc. to inspect some of its adult detention facilities, but DHS’s Office of Inspector General has found that the contractor is unable to provide effective oversight because its “inspection practices are not consistently thorough, [and] its inspections do not fully examine actual conditions or identify all compliance deficiencies.”²⁷ DHS’s proposal to allow certification by an entity that is not wholly independent of the agency is extremely problematic, in light of the serious deficiencies with DHS’s current compliance contractors, as well as the compliance issues that have already been documented in the FRCs.²⁸ To allow such a scheme would run directly counter to the stated child welfare protections in the FSA.

2. 8 CFR § 236.3(i) – DHS’s Proposed Federal Scheme for Licensing Family Detention Centers Fails to Adequately Mirror the FSA.

Even assuming that an alternative federal licensing scheme for detention centers should be permitted – and, as discussed above, it should not – DHS’s proposed scheme fails to adequately implement the terms of the FSA. DHS suggests that its proposed licensing scheme is sufficient because the standards set forth in 8 CFR § 236.3(i)(4) “mirror the requirements in Exhibit 1 of the FSA and the current ICE Family Residential Standards.”²⁹ It further claims that its proposed federal licensing scheme “provide[s] materially identically assurances about the conditions of such facilities.”³⁰ For the following reasons, we disagree with this assertion and are deeply troubled by DHS’s proposal.

First, DHS’s assumption that the FSA Exhibit One standards, coupled with ICE’s Family Residential Standards (“FRC standards”), are adequate to meet the terms of the FSA, is flawed. The title of FSA Exhibit One, “Minimum Standards for Licensed Programs,” shows that the standards are seen as a floor, not a ceiling, to be supplemented by *state* standards. DHS might have a more persuasive argument if the existing FRC standards provided for essentially the same protections as the state licensing requirements. But, they do not. While ICE’s FRC standards note that they were written after a review of the state codes in Texas and Pennsylvania (where the current FRCs operate),³¹ in many instances, the state licensing standards for residential facilities caring for children are much more rigorous than the FRC standards. For example, under the

²⁶ Settlement Agreement, *Flores*, *supra* note 1, ¶ 6.

²⁷ DEPARTMENT OF HOMELAND SECURITY - OFFICE OF INSPECTOR GENERAL, ICE’S INSPECTIONS AND MONITORING OF DETENTION FACILITIES DO NOT LEAD TO SUSTAINED COMPLIANCE OR SYSTEMATIC IMPROVEMENTS 4 (2018), available at <https://www.oig.dhs.gov/sites/default/files/assets/2018-06/OIG-18-67-Jun18.pdf>.

²⁸ Scott Allen, MD & Pamela McPherson, MD, *supra* note, 16 at 1.

²⁹ 83 Fed. Reg. at 45,501.

³⁰ *Id.* at 45,488.

³¹ *E.g.*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE/DRO RESIDENTIAL STANDARD: DISCIPLINE AND BEHAVIOR MANAGEMENT 2 (2007), available at https://www.ice.gov/doclib/dro/family-residential/pdf/rs_discipline_and_behavior_management.pdf.

licensing regulations in Texas, mechanical restraints³² may only be administered by Residential Treatment Centers (i.e., therapeutic care facilities).³³ Even in these facilities, however, Texas standards clearly state that handcuffs and other devices with metal wrist or ankle cuffs cannot be used.³⁴ In contrast, while ICE's FRC standards place certain limitations on general use of mechanical restraints,³⁵ they allow use of these restraints on children over 14 (and some children under 14 with prior approval).³⁶ ICE's standards also specifically allow for handcuffs to be used as a form of restraint on minors.³⁷ Further, Texas standards delineating use of mechanical restraints place a strict time limit on use of such devices. For children over the age of nine, the maximum time for which a facility can employ mechanical restraints is one hour.³⁸ ICE's FRC standards provide no such time limitation on the use of mechanical restraints. Rather, ICE's FRC standards note that "staff may not remove restraints until the resident has regained self-control,"³⁹ and merely note that checks must be made on the detainee's condition every 15 minutes.⁴⁰

These are clear and concerning differences between the Texas state and ICE FRC standards that impact the safety and wellbeing of children in federal custody. Not only do ICE's FRC standards fail to mirror the state requirements contemplated by the FSA, but there is no reasonable justification to eliminate these requirements. Detaining a child with his or her parent(s) does not inherently necessitate use of handcuffs or prolonged restraint.

In other instances, even where it may be the intent of ICE to replicate state requirements, the FRC standards do not always adequately accomplish this purpose. For example, Texas regulations require that licensed residential facilities "feed an infant whenever the infant is hungry."⁴¹ This unambiguous directive is not matched in ICE's FRC guidelines. Rather, the FRC standards state that a facility must meet the "*minimal* nutritional needs of toddlers and infants" and "meet recommended government guidelines for well-baby and well-child growth and development."⁴² While one might assume that ICE is referring to the U.S. Department of Agriculture, Food and Nutrition Service's guidelines,⁴³ this would be entirely speculative since no specific government guidelines are provided. In fact, the exact requirements remain ambiguous

³² "A type of emergency behavior intervention that uses the application of a device to restrict the free movement of all or part of a child's body in order to control physical activity." 26 Texas Admin. Code, Part I, Chapter 748, Subchapter B, Division 1, Rule § 748.43(37).

³³ 26 Texas Admin. Code, Part I, Chapter 748, Subchapter N, Division 1, Rule § 748.2451.

³⁴ 26 Texas Admin. Code, Part I, Chapter 748, Subchapter N, Division 7, Rule § 748.2705.

³⁵ Note that ICE's standards use the general term "restraint," rather than "mechanical restraint," even when they are referring to devices that would be considered "mechanical restraints" under the Texas regulations (e.g., handcuffs). See U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE/DRO RESIDENTIAL STANDARD: USE OF PHYSICAL FORCE AND RESTRAINTS 3 (2007), available at https://www.ice.gov/doclib/dro/family-residential/pdf/rs_use_of_force.pdf.

³⁶ *Id.*

³⁷ *Id.* at 10, 3.

³⁸ 26 Texas Admin. Code, Part I, Chapter 748, Subchapter N, Division 9, Rule § 748.2801.

³⁹ U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, USE OF PHYSICAL FORCE AND RESTRAINTS, *supra* note 31 at 3.

⁴⁰ *Id.*

⁴¹ 26 Texas Admin. Code Part I, Chapter 748, Subchapter J, Division 7, Rule § 748.1691.

⁴² U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE/DRO RESIDENTIAL STANDARD: FOOD SERVICE 16 (2007), available at <https://www.ice.gov/doclib/dro/family-residential/pdf/rs-food-service.pdf>.

⁴³ *Guidelines for Feeding Healthy Infants*, U.S. DEPARTMENT OF AGRICULTURE, <https://wicworks.fns.usda.gov/resources/guidelines-feeding-healthy-infants> (last visited Sept. 26, 2018).

and leave room for various interpretations as the FRC standards neither footnote the guidelines nor attach them as an appendix. Given this ambiguity, ICE's FRC standards fail to provide infants with the same clearly defined protections as the Texas state licensing requirements.

These examples highlight the manner in which ICE's standards fail to adequately mirror state standards and illustrate how the federal licensing scheme proposed by DHS is insufficient under the FSA. If it is determined that a federal scheme is appropriate, DHS should conduct a detailed review of each individual provision of the state licensing standards in Texas and Pennsylvania to determine whether it is: i) relevant and transferrable to facilities detaining accompanied children; and ii) stricter than the existing FRC standards, if any exist on the topic. Without such a review and revision of ICE's FRC standards, the agency's assertions that the federal scheme "mirrors" the state standards is unfounded at best.

Finally, even if such a review is performed and state standards are adequately incorporated by DHS,⁴⁴ any federal scheme must require ongoing analysis of state licensing requirements. This would include analysis of additional states' regulations should new FRCs open in other states outside of Texas and Pennsylvania. It would also include annual analysis of the Texas and Pennsylvania standards to ensure that any updates to the state standards are timely incorporated into the federal licensing standards. Without such ongoing analysis, DHS could not reasonably claim that the federal standards provide "materially identical assurances" to state standards.

3. 8 CFR § 236.3 (b)(11) – DHS's Definition of "Non-Secure Facility" Cannot Appropriately Be Used to Classify FRCs, or Similar Facilities, as Non-Secure.

As noted above, the FSA requires that children be placed in facilities that are "non-secure," unless placement in a secure facility is otherwise required.⁴⁵ The FSA does not, however, define the term "non-secure."⁴⁶ DHS seeks to supply a definition for this term in the proposed rule. To the extent that this definition would allow the existing FRCs, or similar facilities built in the future, to be deemed non-secure, it is unacceptable and contrary to prior determinations of the court.

DHS states that when a definition of "non-secure" is not provided for by the state in which a facility is located, "non-secure facilities" shall be defined as those in which "egress *from a portion of the facility's building is not prohibited* through internal locks within the building or exterior locks and egress from the facility's premises is not prohibited through secure fencing around the perimeter of the building."⁴⁷ In its justification for this provision, DHS notes that it looked to the Pennsylvania code as "a starting point for the proposed definition."⁴⁸ DHS's proposed definition, however, turns Pennsylvania's definition on its head. In Pennsylvania, a

⁴⁴ *E.g.*, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, DISCIPLINE AND BEHAVIOR MANAGEMENT, *supra* note 31, at 2.

⁴⁵ Settlement Agreement, *Flores*, *supra* note 1, ¶¶ 6, 23.

⁴⁶ *See id.*

⁴⁷ 83 Fed. Reg. at 45,525.

⁴⁸ *Id.* at 45,497 n. 14.

facility is deemed *secure* if egress from *any portion* of the facility is prohibited through locks.⁴⁹ In contrast, under the natural reading of DHS’s definition, a facility could have multiple egress points that are locked and still not be deemed “secure” as long as one egress point is lock-free. If DHS intended to match the Pennsylvania state definition, DHS should consider rewriting its definition to state clearly that a facility is only non-secure if egress is not prohibited in any section of the facility. DHS provides no justification for this significant deviation nor clarity on its definition to this point.

The proposed definition is unacceptable to the extent that DHS is seeking to provide a definition that would allow the existing FRCs, or any similar facilities built in the future, to be deemed non-secure. DHS cannot unilaterally supply a definition of “non-secure,” particularly one that is not as rigorous as existing state definitions, to further its own agenda. Moreover, the U.S. District Court for the Central District of California has already found the existing FRC facilities to be secure.⁵⁰ Thus, these facilities, and any similarly designed facilities DHS constructs in the future, cannot be appropriately classified as non-secure. Promulgating such a definition would undermine the purpose of the FSA’s protections on this issue, protections that seek to ensure that children are placed in the least-restrictive environment that is appropriate.⁵¹

4. 8 CFR § 236.3(b)(5), 8 CFR § 236.3(g)(2), and 45 CFR § 410.101 – DHS’s and HHS’s Revised Definition of “Emergency” and Corresponding References Seek to Inappropriately Expand the FSA’s Exception.

The FSA provides an exception to the requirement for timely placement of children in licensed facilities by the government when there is an “emergency.”⁵² It states that emergencies “include, natural disasters (e.g., earthquakes, hurricanes, etc.), facility fires, civil disturbances, and medical emergencies (e.g., a chicken pox epidemic among a group of minors).”⁵³ In both DHS’s and HHS’s proposed regulations, however, “emergency” is defined as “an act or event (including, but not limited to a natural disaster, facility fire, civil disturbance, or medical or public health concerns at one or more facilities) that prevents timely transport or placement of minors, *or impacts other conditions provided by this section.*”⁵⁴

The agencies’ proposals to revise and expand the emergency exception ignore the fact that the government voluntarily entered into the FSA and negotiated its terms. Had the government wanted to create a broader emergency exception, it should have attempted to do so before signing

⁴⁹ 55 Pa. Code § 3800.5 (stating a secure care facility is one in which “voluntary egress is prohibited through one of the following mechanisms: (i) Egress from the building, or a portion of the building, is prohibited through internal locks within the building or exterior locks. (ii) Egress from the premises is prohibited through secure fencing around the perimeter of the building.”).

⁵⁰ 2015 Order on Motion to Enforce, *Flores, et al. v. Johnson*, *supra* note 10, at 15 (“[E]ven if the Court disregards the conditions in, and the unlicensed status of, the facilities, the facilities are secure, which violates the Agreement’s requirement[s].”).

⁵¹ See Settlement Agreement, *Flores*, *supra* note 1, ¶ 11.

⁵² *Id.* at ¶ 12(B).

⁵³ *Id.*

⁵⁴ 83 Fed. Reg. at 45,525 (emphasis added); *accord id.* at 45,529.

the agreement in 1996. Emergency exceptions were clearly a topic of consideration and negotiation between the parties. Indeed, parties to the FSA specifically incorporated the emergency exception in certain sections of the agreement (e.g., in the provisions on transfer to licensed facilities) but chose *not* to provide similar exceptions for other provisions, such as those that limit housing children with unrelated adults. DHS even admits that its proposal does not adhere to the FSA’s terms, stating that its definition of the term emergency “reflects DHS’s recognition that emergencies may not only delay placement of minors, but *could also delay compliance with other provisions of this proposed rule, or excuse noncompliance on a temporary basis.*”⁵⁵ Despite the operational realities that DHS may be facing, such an effort to expand unilaterally the emergency exception and create a safeguard to excuse future breaches of the FSA’s terms is untenable – due to the voluntary nature of the agreement, the fact that the Flores court approved the Agreement, the fact that the parties clearly contemplated when emergencies should excuse non-compliance, and larger public policy concerns.

From a public policy perspective, the proposed definition gives serious cause for concern. It provides DHS and HHS with broad discretion to define what constitutes an emergency. This is a fact that DHS admits in its justification, noting that the proposed definition “is flexible and designed to cover a wide range of possible emergencies.”⁵⁶ Consequently, under the proposed definition, DHS could, in theory, define “emergency” to include lack of available staffing due to the flu. Because DHS’s proposed rule also creates a new emergency exception excusing non-compliance with limitations for holding minors with unrelated adults,⁵⁷ it could then theoretically use its lack of staffing as an excuse for holding children with unrelated adults for more than 24 hours. To do so would put such minors at increased risk for abuse and harm, and it directly contravenes the plain language and intent of the FSA. The FSA strictly limits placement of children with unrelated adults to 24 hours.⁵⁸

For these reasons, DHS’s and HHS’s proposals contravene the FSA and raise significant public policy concerns. We urge DHS and HHS to revise their proposed definitions of “emergency,” and corresponding references, in the final rule to reflect the terms the government agreed to in the FSA. And, if DHS and HHS feel that broadening the exception is essential to their operations, they should negotiate this with opposing counsel, and attempt to secure the court’s agreement thereto. As Judge Gee has noted, “the parties are always free to meet and confer regarding any contractual amendments on which they can mutually agree. This is basic contract law.”⁵⁹

⁵⁵ *Id.* at 45,496 (emphasis added).

⁵⁶ *Id.*

⁵⁷ *Id.* at 45,526.

⁵⁸ Settlement Agreement, *Flores*, *supra* note 1, ¶ 12 (“The INS will segregate unaccompanied minors from unrelated adults. Where such segregation is not immediately possible, an unaccompanied minor will not be detained with an unrelated adult for more than 24 hours.”).

⁵⁹ Order Denying Ex Part Application for Limited Relief at 7, *Flores et al. v. Sessions et al.*, Case No. CV 85-4544 (C.D. Cal. July 9, 2018), available at <https://www.aila.org/File/Related/14111359ac.pdf>.

5. 8 CFR § 410.302(e) – HHS Should Provide Flexibility in Home Study and Post-Release Services Requirements to Ensure Ability to Timely Respond to Emerging Child Protection Needs

In its discussion of 8 CFR § 410.302(e), HHS specifically invites comments on whether it should set forth in the final rule policies regarding requirements for home studies, denial of release to sponsors, and post-release services.⁶⁰ As a long-time provider of home studies⁶¹ and post-release services,⁶² we encourage HHS not to include these requirements in the final rule. Instead, we recommend ORR develop specific guidelines and minimum requirements for these services in its Policy Guide.⁶³

Family reunification services are vital to promote safe and stable placements of children in appropriate environments. As social service providers, we have seen that unaccompanied children are particularly vulnerable to human trafficking, forced domestic servitude, and other exploitative situations. Standards for determining which children receive family reunification services have developed over time, responding to newly identified needs and vulnerabilities. Take, for example, the development of new home study categories in response to the Marion, Ohio egg farm case. Over a period of four months in 2014, ORR released eight children into the care of human traffickers. None of the children received home studies, and, after release, the children were subjected to labor trafficking on an egg farm in Marion.⁶⁴ Local and federal officers discovered the trafficking situation during a raid of the farm in December 2014.⁶⁵ In response to this incident and a corresponding investigation by the Senate Homeland Security and Government Affairs' Subcommittee on Permanent Investigations, ORR announced in July 2015 that it was adding two discretionary categories of home studies⁶⁶ for: (i) all unaccompanied children 12 years of age and under who are to be placed with a Category 3 sponsor; and (ii) any proposed sponsor who is a non-

⁶⁰ 83 Fed. Reg. at 45,507.

⁶¹ During a home study, a community-based case worker assesses the safety and suitability of the proposed caregiver and placement, including the caregiver's capacity to meet the child's unique needs, any potential risks of the placement, and the caregiver's motivation and commitment to care for the child. Home studies result in a recommendation on whether placement with the proposed caregiver is in the child's best interest.

⁶² Post-release services include risk assessment and action-planning with families around areas of need and concern, connection to community services, and provision of a referral to legal services. Consequently, these services are not only critical to ensuring a child's safe placement, but they also mitigate the risk for family breakdown, facilitate community integration, and help the family understand the need to comply with their immigration court proceedings.

⁶³ *Children Entering the United States Unaccompanied*, OFFICE OF REFUGEE RESETTLEMENT (Aug. 30, 2018), <https://www.acf.hhs.gov/orr/resource/children-entering-the-united-states-unaccompanied>.

⁶⁴ PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS, PROTECTING UNACCOMPANIED ALIEN CHILDREN FROM TRAFFICKING AND OTHER ABUSES 1 (2016), *available at* <https://www.hsgac.senate.gov/imo/media/doc/Majority%20&%20Minority%20Staff%20Report%20-%20Protecting%20Unaccompanied%20Alien%20Children%20from%20Trafficking%20and%20Other%20Abuses%202016-01-282.pdf>.

⁶⁵ Abbie Van Sickle, *Overwhelmed Federal Officials Released Immigrant Teens to Traffickers in 2014*, THE WASHINGTON POST (Jan. 26, 2016), https://www.washingtonpost.com/national/failures-in-handling-unaccompanied-migrant-minors-have-led-to-trafficking/2016/01/26/c47de164-c138-11e5-9443-7074c3645405_story.html?utm_term=.d4002785484e.

⁶⁶ Those that are not specifically required by statute.

relative and is seeking to sponsor multiple children or has previously sponsored a child and is seeking to sponsor additional children.⁶⁷

As new areas of vulnerability or concern are identified, it is important that ORR have the flexibility to respond and improve home study and post-release standards as quickly as possible. We caution against setting these standards via rulemaking as it likely would not allow ORR this necessary flexibility. For example, while the response was certainly not immediate after the Marion trafficking case, discussed above, had the standards been regulated in a manner requiring notice-and-comment rulemaking prior ORR's addition of new home study categories, the regulatory process would have delayed ORR's programmatic response by months.⁶⁸

USCCB supports and encourages the continuing development of minimum standards for family reunification services. To allow it the necessary flexibility, we suggest ORR do this through its Policy Guide. Standards should be developed with input and feedback from services providers and other organizations with expertise in this area. Further, while ORR has made some progress in improving and expanding family reunification services to promote the safety of children, the fact is that the vast majority of children released from ORR care do not receive these vital services,⁶⁹ and it must continue to address new needs and vulnerabilities that are identified. To that end, ORR should facilitate annual engagement, at a minimum, with service providers and other key organizations to discuss the existing standards and evaluate new and additional risk factors for placement of unaccompanied children.⁷⁰

At a minimum, if ORR decides to issue regulations on family reunification standards, we urge it to ensure that these standards are framed as *minimum* requirements. To do so would help ensure ORR has the flexibility it needs in the future to timely respond and improve standards that promote safety of children, without conflicting with the existing regulations.

In sum, USCCB supports the development of minimum standards for family reunification services, but we caution against the use of rulemaking to do so.

⁶⁷ PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, *supra* note, 64 at 20.

⁶⁸ While ORR could try to invoke the "good cause" exception to the Administrative Procedure Act requirements, this would open the door to litigation. 5 U.S.C. §553(d)(3); MAEVE P. CAREY, CONGRESSIONAL RESEARCH SERVICE, THE FEDERAL RULEMAKING PROCESS 7 (2013), available at <https://fas.org/sgp/crs/misc/RL32240.pdf> ("A federal agency's invocation of the good cause exception (or other exceptions to notice and comment procedures) is subject to judicial review.").

⁶⁹ In FY 2017, ORR provided family reunification services for less than thirty-two percent of the 42,416 children released from its care - with only 7% of youth receiving home studies. See *Facts and Data*, OFFICE OF REFUGEE RESETTLEMENT (June 25, 2018), <https://www.acf.hhs.gov/orr/about/ucs/facts-and-data>.

⁷⁰ In USCCB/MRS's experience, for example, factors such as a youth being a pregnant or parenting teen should be added to the list necessitating a discretionary home study.

Conclusion

For the reasons set forth above, the proposed rule fails to adequately implement the terms of the FSA, and DHS and HHS lack the authority to unilaterally make the changes they propose to the FSA. Even if the proposed rule were legally permissible, however, it is objectionable from a public policy standpoint. The NPRM repeatedly seeks to undermine existing protections for children -- protections which have served to safeguard immigrant children from neglect, abuse, and exploitation. We urge DHS and HHS either to abandon this rulemaking or to revise the proposed rule to mirror the conditions agreed upon in the FSA.

Respectfully submitted,

A handwritten signature in blue ink that reads "Anthony R. Picarello, Jr." in a cursive script.

Anthony R. Picarello, Jr.
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